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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 157

RAYMOND TERRIO,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Summary

Petitioner Raymond Terrio and one James Jeffrey Brown were indicted in the United States District Court for the Southern District of Texas on three counts alleging *First,* a conspiracy by them to commit offenses against

the United States of America as follows (a) Violations under Section 2553(a), Title 26, U. S. Code, and (b) Violations under Section 2554(a), Title 26, U. S. Code, *Second*, a purchase by them of heroin in Houston, Harris County, Texas, not in or from the original stamped package, violating Sec. 2553(a), Title 26, United States Code, and *Third*, that in Houston, Harris County, Texas, they fraudulently and knowingly received, concealed, bought, sold and facilitated the transportation of heroin, after importation, knowing the same to have been imported into the United States contrary to law, violating Sec. 174, Title 21, U. S. Code.

Petitioner and his co-defendant timely moved to suppress evidence (R. 5), which was overruled, and renewed objection at trial (R. 95), which was overruled. Petitioner then and now contends that evidence procured by a search without warrant incident to an unlawful arrest without warrant was in violation of his constitutional rights. The possession of heroin on his person revealed by such arrest and search was relied upon by the prosecution and constitutes the only evidence relied on by the prosecution to support a verdict of guilty on Counts 2 and 3 of the indictment. Appellant was acquitted on Count 1 and his co-defendant on all counts.

There was no opinion by the District Court and the Court of Appeals affirmed Per Curiam without opinion.

II

Jurisdiction

The judgments below was rendered on April 25, 1951, motion for rehearing, timely filed, was overruled on the 30th day of May, 1951. (R. 154-156).

The jurisdiction of this Court is invoked under Sec. 1254 of the Judicial Code as amended June 25, 1948 (28 USCA § 1254).

III

Questions Presented

1. The constitutional guaranties of the Fourth Amendment to the Constitution of the United States securing to its citizens the right to privacy and personal security was violated by an unlawful arrest and search, and the evidence procured thereby should have been suppressed.

2. Due process of law as guaranteed to its citizens by the 5th Amendment to the Constitution of the United States is denied where a statutory presumption is indulged to provide the only evidence of a material, essential element of a crime charged, when the prosecution by its own evidence has affirmatively disclosed that such element did not, or probably did not, exist, such that Count II of the indictment alleging purchase in Houston, Harris County, Texas, was unsupported by any evidence of venue absent such presumption so unlawfully indulged and petitioner's constitutional right to trial in the State where the crime shall have been committed as contained in the Constitution of the United States, Article III, Section 2, paragraph 3, and in Amendment VI thereof, was denied him, and such that Count III of the indictment alleging unlawful concealment, etc., of heroin, after its unlawful importation, knowing the same to have been imported contrary to law, was unsupported by any evidence of its unlawful importation or of petitioner's knowledge, absent such presumption so unlawfully indulged.

3. An unlawful double punishment results where a single act, lawful in itself, is made sufficient proof of two different crimes by the indulgence of separate statute-created presumptions, and reversible error is presented when punishment for conviction of two such crimes is made cumulative.

IV

Statement

A. *The Unlawful Arrest.* Petitioner filed Motion to Suppress Evidence (R. 5-6), and after hearing the evidence thereon, the District Court overruled it (R. 46). Objection was reviewed at trial (R. 95). The arrest was without a warrant (R. 32). An informer had talked to the arresting officer, a United States narcotics agent, about petitioner, stating that he was a narcotics wholesaler who had solicited the informer (a narcotics dealer) to buy from him (R. 29), such that the background of petitioner's alleged activity and circuit, including Houston, was known to the arresting officers. Petitioner called the informer about midnight, June 2nd, announcing his arrival after driving all night, and called again the next morning about 8:30 to arrange delivery. (R. 13, 14). The informer immediately notified the arresting officer. (R. 14). The informer met the arresting officer about one hour later at a prearranged meeting place in the vicinity of the point where the informer was to have met petitioner (R. 15), and the arresting officer and numerous other officers, in two cars, preceded the informer to a filling station adjacent to such point. (R. 16). The arresting officer did not pretend that he had not sufficient time to have procured a warrant, but only that his informer never positively told him petitioner had the stuff until after the informer had met petitioner (R. 31, 32). The informer testified he could state positively that petitioner had heroin only after he had sampled it. (R. 19). At the time of the arrest the informer had not told him petitioner was about to escape, but on the contrary that he was coming to the very filling station the officers were in to complete a delivery, and

the officers immediately proceeded to intercept petitioner on his way there and arrest and search him. (R. 32, 33). The foregoing record references are exclusively to the testimony as developed on motion to suppress, but on trial, over objection, the same testimony was developed in full detail by the prosecution.

B. *Venue.* The prosecution, by its witnesses, developed that petitioner had called the informer from Utah, Alabama, that he was on his way with the stuff (R. 54). That he called the informer on the night preceding the arrest and said he had been driving all night. The informer testified petitioner resided in the State of Louisiana (R. 67). Petitioner was arrested at a tourist court. (R. 94, 95). That petitioner and his co-defendant had come to Houston from New Orleans, arriving in Houston the night of the arrest, was confirmed by the testimony of petitioner's co-defendant, (R. 116) whom the jury, by their acquittal, believed.

C. *Unlawful Importation & Petitioner's Knowledge Thereof.* The prosecution, by its witness W. H. Crook, proved that heroin cannot be legally manufactured in this country, but that heroin found in this country is usually left over stock, heroin that was in drugstores left over after the act was passed forbidding its importation or manufacture.

V

Specifications of Errors to Be Urged

1. The Court below erred in overruling Petitioner's 4th Specification of Error in that Court, complaining of the action of the trial court in overruling his Motion to Suppress and admitting into evidence the results of a search of Petitioner incident to his arrest, for the arrest of petitioner

without warrant was unlawful for each of the following reasons:

(a) The arrest without warrant was unlawful under the laws of the State of Texas, when it occurred, and

(b) There having been ample time with little or no risk to have obtained a warrant, the arrest without warrant was unlawful.

2. The Court below erred in overruling Petitioner's 1st Specification of Error in that Court complaining of the want of any evidence to support a conviction under Count III of the indictment, since there was no evidence to support such conviction without relying upon a statute created presumption, the indulgence of which in this case violates due process of law.

3. The Court below erred in overruling Petitioner's 2nd Specification of Error in that Court complaining of the want of any evidence to support a conviction under Count II of the indictment, since there was no evidence to support such conviction without relying upon a statute created presumption, the indulgence of which in this case violates due process of law.

4. The Court below erred in overruling petitioner's 3rd Specification of Error in that Court, since an unlawful double punishment resulted in relying for proof of two separate crimes on statutory presumptions arising from a single innocent act, and the sentences should not have been made to run consecutively.

Reasons for Granting the Writ

Petitioner respectfully shows to this Honorable Court that a Writ of Certiorari should be issued directing the removal of the cause to this Court, because:

1. The per curiam opinion of the Court of Appeals, in overruling and holding without merit petitioner's specifica-

tions of error, forms no basis for a showing to this Court wherein the opinion within itself is erroneous. But substantial questions concerning violations of the constitutional rights of the accused were raised by his appeal, and the judgment against petitioner should have been reversed. It is a dangerous practice for a Court of Appeals to dispose of such contentions per curiam, for it obscures and lends comfort to practices designed to deprive the citizen of his constitutional safeguards. The Court of Appeals held, in effect, that an arrest by a Federal Narcotics Agent without a warrant was lawful, although not conforming to the laws of the State where the arrest occurred, and as such is in direct conflict with the opinion of this Honorable Court in *United States* v. *Di Re,* 332 U. S. 581, 92 L. Ed. 210. The Court of Appeals held, in effect, that an arrest without warrant by a Federal Narcotics officer was lawful where, after learning of the probable existence of facts justifying a warrant, and with ample time under the then circumstances to have procured a warrant with little or no risk by delay of losing opportunity, he makes no effort to obtain a warrant, and as such is in direct conflict with the holding of this Honorable Court in *Johnson* v. *United States,* 333 U. S. 10, 92 L. Ed. 436.

Such holding denied petitioner his constitutional guaranties of personal security and right of privacy derived under the 4th Amendment to the Constitution of the United States. It does not suffice for this Honorable Court to properly define certain constitutional limits of the power of federal law enforcement agencies to arrest without warrant, when such limits are disregarded by the agencies and by Federal District Courts and Courts of Appeal, but in order to secure to its citizens the safeguards of the 4th Amendment, the decisions of inferior courts denying an accused those safeguards must be reviewed and corrected by this

Court until the inferior courts and enforcement agencies become convinced.

2. The Court of Appeals held, in effect, that a legislative presumption may validly and constitutionally be indulged to supply all of the evidence of a material, essential element of a crime upon proof of the fact of possession, even when the prosecution has shown that such presumed facts did not, or at least probably did not, exist, and as such is in direct conflict with the holding of this Honorable Court in *Tot* v. *United States,* 319 U. S. 463, 87 L. Ed. 1519. The Court of Appeals, in so holding as to the presumption created by Sec. 174 of Title 21, U. S. Code, apparently relied on the holding of this Court in *Yee Hem* v. *United States,* 268 U. S. 178; 69 L. Ed. 904, wherein, under the facts in that case, it was held that the presumption could validly be made, and in so holding as to the presumption created by Sec. 2553 of Title 26, U. S. Internal Revenue Code, apparently relied on the holding of this Court in *Casey* v. *U. S.* 276, U. S. 413; 72 L. Ed. 632, wherein, under the facts in that case, it was held that the presumption could validly be made. In each such instance the Court of Appeals failed to observe that "due process" as applied to a legislative presumption sought to be indulged in any given case depends on the facts developed in that case, and that the *Yee Hem* and *Casey* cases, supra, do not broadly hold the legislative presumptions involved therein valid, but only that they might validly be indulged in those cases. Legislative presumptions are being extended, and the distinction which the Court of Appeals failed to observe is of such importance that it should be clearly drawn by this Honorable Court, so that law enforcement agencies, the prosecution and lower courts may keep in mind and preserve the need to afford due process of law to an accused in each case without relying on prior decisions as establishing the general validity of a legislative presumption.

3. The Court of Appeals held, in effect, that it was not unlawful double punishment to make sentences run consecutively upon conviction of two offenses, where proof of guilt in each depended exclusively on presumptions created by statute upon proof of a single common fact not criminal in itself, and in so holding was in direct conflict with *Copperthwaite* v. *United States,* 37 F.(2) 846. *Blockburger* v. *United States,* 284 U. S. 299, 76 L. Ed. 306, and *Michener* v. *United States,* 331 U. S. 790, 91 L. Ed. 1818, establish that a single act can be made the subject of more than one crime, but neither undertook to overrule the holding of *Copperthwaite* v. *United States,* supra, and the doctrine is onerous under those cases without extension, and a review of the question presented should be had that reaffirms the salutary limits set forth in the *Copperthwaite* case.

Conclusion

Since the questions presented are of general importance and since the decision below conflicts with other decisions, the petition for writ of certiorari should be granted.

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